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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1986

RENA O. HILL
STAFF SERGEANT, UNITED STATES AIR FORCE, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the petitioner's conviction of the charge and specification should be set aside because the evidence is insufficient to prove guilt beyond a reasonable doubt as required by the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

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In the Supreme Court of the United States

_____ Term, _____

No. _____

RENA O. HILL
STAFF SERGEANT, UNITED STATES AIR FORCE, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Rena O. Hill, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The order of the United States Court of Military Appeals is reported at ___ M.J. ___ (C.M.A. 1987) (Appendix A). The *per curiam* opinion of the United States Air Force Court of Military Review, dated 25 October 1985, was unpublished (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered 8 April 1987. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

UNIFORM CODE OF MILITARY JUSTICE PROVISION INVOLVED

Article 112 (a), U.C.M.J., (10 U.S.C. § 912 (a)) provides, in pertinent part:

> (a) Any person subject to this chapter who wrongfully uses . . . any substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substances referred to in subsection (a) are the following:
>
> > Opium, heroin, cocaine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and **marijuana** and any compound or derivative of any such substance. (emphasis added).

STATEMENT OF THE CASE

Petitioner was tried by a special court-martial, military judge alone, on 18 and 19 May 1985 at England Air Force Base, Louisiana. Contrary to her pleas of not guilty, she was convicted of one specification of wrongfully using marijuana between 18 December 1984 and 18 January 1985, in violation of Article 112 (a), Uniform Code of Military Justice (10 U.S.C. § 912 (a)). The military judge sentenced her to be discharged from the United States Air Force with a bad conduct discharge, to forfeit $200 of

her pay per month for 4 months, and to be reduced in grade to Airman Basic (E-1). On 25 July 1985, the convening authority approved the findings and sentence.

The United States Air Force Court of Military Review affirmed the findings and sentence, *per curiam*, on 28 October 1985. Upon discretionary review under Article 67 (b) (3), U.C.M.J. (10 U.S.C. § 867 (b) (3)), the United States Court of Military Appeals affirmed 8 April 1987. The issue herein presented was raised before both lower courts.

The specification and charge were based upon urinalysis of a urine sample petitioner provided during a random unit inspection conducted 18 January 1985 at the England Air Force Base Clinic. Senior Airman Beverly Hagen Jones, a laboratory technician, observed Staff Sergeant Hill from the restroom stall door while she urinated into either a styrofoam or sterile cup. (R. 50, 52-64, 79). After Senior Airman Jones verified that the proper amount had been provided, she transferred the sample to a specimen bottle, initialled the bottle, and took it to the noncommissioned officer in charge, Technical Sergeant Richard Plumlee (R. 52). He also carefully compared each specimen with a sample filled with the correct quantity of red dye. (R. 73 and 81). Tamper resistant tape was not yet required to secure each specimen bottle, but each bottle top was securely fastened. (R. 82). The samples were shipped to the Brooks Air Force Base Drug Detection Laboratory in a sealed box. (R. 88).

Despite all these precautions, two of the specimens shipped with the petitioner's did not contain a sufficient quantity for testing. (R. 106). Those samples had to be destroyed. (R. 107). No reasonable explanation for the insufficient samples, other than human error, was advanced at trial. (*See*, R. 136). There was no evidence of leakage during shipment. (*See*, R. 157).

After radioimmunoassay (RIA) screening at the Brooks Laboratory, petitioner's specimen was shipped to CompuChem Laboratories in Research Triangle Park, North Carolina. Although that facility was certified by the Department of Defense in 1983, it had not been recertified since changing ownership. (R. 194).

At the CompuChem Laboratory, the specimen was tested by gas chromatography mass spectrometry. Doctor Naresh Jain, an expert witness for the prosecution, examined the prosecution exhibits reporting chain-of-custody and testing, and testified that petitioner's sample contained the marijuana metabolete, Delta 9 THC caroboxylic acid in a concentration of approximately 61 nanograms per milliliter. (R. 191). In his opinion, an individual with that level of marijuana in his or her system would have felt some effect after ingesting the marijuana.

There was no other evidence that petitioner knowingly used marijuana.

REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fifth Amendment to the United States Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. *In re Winship*, 397 U.S. 358 (1970). Absent an express determination by Congress to the contrary, every criminal offense which subjects an accused to felony-strength punishment requires an element of *mens rea* or criminal state of mind. *Morissette* v. *United States*, 342 U.S. 246 (1952). Petitioner submits that the prosecution failed to prove that she **knowingly** used marijuana beyond a reasonable doubt, and she was held strictly liable under a *malum prohibitum* theory of law, in violation of her right to due process of law.

The prosecution fails to satisfy its burden of proof when it relies soley upon a presumption to establish the element of *mens rea*, or requires the accused to negative the existance of such an element. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1974). In *Mullaney* v. *Wilbur* this Honorable Court rejected the government's argument that logic and the logistics of proving state of mind dictated that an accused should bear the burden of proving that element in a homicide case:

> It has been suggested . . . that because of the difficulties in negating an argument that the homicide was committed in the heat of passion, the burden of proving this fact should rest upon the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. **But this is the traditional burden which our criminal justice deems essential . . . Although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not . . . justify shifting the burden to him.**

Id., at 701-702 (emphasis added).

Three years later, permissibly shifting the burden of proof as to an affirmative defense was distinguished in *Patterson* v. *New York*, 432 U.S. 197 (1977). In that case, the jury was instructed that an accused charged with murder "had the burden of proving his affirmative defense [of extreme emotional disturbance] by a preponderance of the evidence." *Id.* Had this defense been established, it would have reduced the offense from murder to manslaughter. Unlike the situation in *Mullaney, supra*, the statute in question ". . . included all the facts which the state was required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts [were] either presumed or inferred in order to constitute

the crime." *Id.*, at 205-206. Additionally, the affirmative defense of extreme emotional distress did not serve to negative any of the facts the state was required to prove in order to convict the accused. Instead, the "true" affirmative defense scrutinized in *Patterson* constituted a separate issue. *Id.* at 206-207.

The Court refused to impose the burden of disproving a "true" affirmative defense on the prosecution. Just as clearly, it refused to shift the burden of disproving any element of the offense to the defendant:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt any and all affirmative defenses related to the culpability of an accused . . . We, therefore, will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all the elements included in the definition of the offense of which the defendant is charged. *Id.*

The Due Process Clause, does not, therefore, prevent the States from creating affirmative defenses based upon justifications wholly independent of the essential facts or elements constituting the crime, and in so doing, placing the burden of producing evidence supporting that defense upon the accused. For facts to be properly classified as a "true" affirmative defense, however, they must operate as an excuse or justification for an accused, who in effect admits his guilt, but pleads nonenforceability on other grounds. *United States ex. rel. Crosby* v. *Delaware*, 346 F.Supp. 213, 216 (D.C. Del. 1972); *see also*, *United States* v. *Cuffee*, 10 M.J. 381 (C.M.A. 1981) (accused may be forced to bear burden of production as to affirmative defenses created by statutory exceptions to criminal

codes). The state may only create an affirmative defense upon a rational basis. *Crosby* v. *Delaware*, *supra*, 216.

Applying these principles to the present *Manual for Courts-Martial* (M.C.M., 1984.), it becomes clear that it offers no rational basis, nor does it even address the matter of eliminating *mens rea* as an element and making the lack of knowledge some sort of quasi-affirmative defense to the crime of using marijuana. Paragraph 37 (b) (2), M.C.M. 1984, establishes "wrongfulness" as an essential element of the offense. It goes on to specify three "exceptions" when use of contraband is not wrongful: (A) an act pursuant to legitimate law enforcement activities; (B) an act pursuant to medical authorization; and (C) without knowledge of the contraband nature of the substance. A critical distinction between these exceptions, is that while the first two set out true affirmative defenses, the third exception cannot be so characterized. If there is an elemental requirement of *scienter* or *mens rea* within wrongful use, mere statement in the negative ("[an act] without knowledge of the contraband nature of the substance") cannot magically convert that element into an affirmative defense. The prosecution cannot be properly absolved of its burden to prove that element beyond a reasonable doubt.

In the case, *sub judice*, the prosecution relied upon an inference that the presence of marijuana in the form of the THC metabolite in the petitioner's system established that she knowingly used the substance. In examining the validity of such an inference, the rational connection between the evidence presented and the facts inferred is a critical consideration. *See*, *Mullaney* v. *Wilbur*, *supra*,; *Tot* v. *United States*, 319 U.S. 463 (1943); *Leary* v. *United States*, 395 U.S. 6 (1969). Although certainly distinguishable, the Kansas Supreme Court recently examined a similar inference in establishing wrongful possession of drugs.

> [Although d]iscovery of a drug in a person's blood is circumstantial evidence tending to prove prior possession of drugs . . . it is not sufficient evidence to establish guilt beyond a reasonable doubt. The absence of proof to evince knowledgeable possession is the key. The drug might have been injected involuntarily or introduced by artifice into the defendant's system.

State v. *Flinchpaugh*, 659 P.2d 208 (Kansas 1983).

In short, mere presence of contraband in a person's system cannot sufficiently establish knowing use, or, by definition, wrongfulness beyond a reasonable doubt. *Contra*, *United States* v. *Harper*, 22 M.J. 157 (C.M.A. 1986); *United States* v. *Ford*, 23 M.J. 331 (C.M.A. 1987); *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States* v. *Bassano*, 23 M.J. 661 (A.F.C.M.R. 1987).

In this case, the prosecution failed to present any evidence that petitioner **knowingly** ingested marijuana, permitting the prosecution to rely upon even a "permissive" inference to establish an essential *mens rea* element is nothing more than impermissibly shifting the burden of proof to the accused by presuming the existance of that element. The constitutional standard of proof beyond a reasonable doubt as to each and every element of the charged offense was not met.

It is important to realize that granting petitioner's petition and the relief sought in no way diminishes the government's ability to combat drug abuse in the military services through urinalysis testing. Nothing would preclude the government from pursuing its many administrative remedies, including discharge. What petitioner protests is the unique military practice of relying exclusively upon urinalysis test results to impose criminal sanctions against an accused.

CONCLUSION

Petitioner submits that her petition for writ of certiorari should be granted in the interest of the fair

administration of military justice and requests that the finding of guilt to the charge and specification and the sentence be set aside and the charge and specification dismissed.

Respectfully submitted.

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Major, OTJAG
United States Air Force

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54130/AF
CMR Dkt. No. S26813

UNITED STATES, APPELLEE,
v.
RENA O. HILL (262-33-3242), APPELLANT.

ORDER

On consideration of the granted issue (22 M.J. 352) in light of *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987) and *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987), it is, by the Court, this 8th day of April 1987,

ORDERED

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (BAKER)
Appellate Government Counsel (BARTON)

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES
v.
Staff Sergeant RENA O. HILL, FR 262-33-3242
United States Air Force
ACM S26813

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25 OCT 1985

Sentence adjudged 29 May 1985 by SPCM convened at England Air Force Base, Louisiana. Military Judge: David M. Lewis (sitting alone).

Approved sentence: Bad conduct discharge, forfeiture of two hundred dollars ($200.00) per month for four (4) months and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi, Major Conrad C. Baldwin, Jr., and Major Francis T. Lacey, USAFR. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Major David F. Barton.

Before

HODGSON, FORAY and MICHALSKI
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materialy prejudicial to the substantial rights of the accused was committed. *Murray v. Haldeman*, 16 M.J. 74

(C.M.A. 1984); *United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985); *United States v. Frost*, 19 M.J. 509 (A.F.C.M.R. 19849. Accordingly, the findings of guilty and sentence are

AFFIRMED.

APPENDIX B

OFFICIAL

ELVA J. SMITH
Documents Examiner
Court of Military Review

☆ U.S. GOVERNMENT PRINTING OFFICE: 1986 181483 40508

Nos. 86-1953, 86-1954, and 86-1955

In the Supreme Court of the United States

OCTOBER TERM, 1987

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RENA O. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR W. MARBLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

CALVIN COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an instruction permitting a court-martial panel to infer that petitioner's use of marijuana was "wrongful" shifted the burden of proof on that element of the offense to petitioner (Nos. 86-1953, 86-1954, and 86-1955).

2. Whether the military's procedure of warrantless, random, compulsory urinalysis inspections violates the Fourth Amendment in the absence of a reasonable suspicion that a servicemember has used narcotics (No. 86-1955).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1953

RENA O. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-1954

ARTHUR W. MARBLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-1955

CALVIN COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the Court of Military Appeals (86-1953 Pet. App. 1a; 86-1954 Pet. App. 1a; 86-1955 Pet. App. 1a) are reported at 24 M.J. 127. The orders of the Air Force Court of Military Review (86-1953 Pet. App. 2a-3a; 86-1954 Pet. App. 2a-3a; 86-1955 Pet. App. 2a) are unreported.

JURISDICTION

The judgments of the Court of Military Appeals (86-1953 Pet. App. 1a; 86-1954 Pet. App. 1a; 86-1955 Pet. App. 1a) were entered on April 8, 1987. The petitions for writs of certiorari were filed on June 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

1. *No. 86-1953.* Following a special court-martial before a military judge at England Air Force Base in Louisiana, petitioner Hill, a member of the United States Air Force, was convicted of the wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. She was sentenced to an $800 forfeiture of pay, a reduction in grade, and a bad conduct discharge. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1953 Pet. App. 2a-3a). The Court of Military Appeals affirmed (*id.* at 1a).

On January 18, 1985, petitioner Hill provided a urine sample at the England Air Force Base hospital as part of a random inspection of members of her unit (Tr. 33). That day, petitioner's sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base in Texas (Tr. 74-76; GX 5). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Labs, a civilian toxicology laboratory, disclosed the presence of tetrahydrocannabinoid (THC) in petitioner Hill's urine (Tr. 181, 191). THC is the major psychoactive metabolite of marijuana; it is unique to marijuana and is found in no other substance (Tr. 165).

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Naresh C. Jain, an expert in forensic toxicology, who interpreted the test results (Tr. 159-209; GXs 6, 8, 11). Dr. Jain testified that the level of THC in petitioner Hill's urine sample was "absolutely" consistent with petitioner's use of marijuana within the 30 days preceding the date she provided the sample, and that she had most likely used marijuana within the preceding three days (Tr. 192). Dr. Jain categorically rejected any possibility that contamination of the sample or passive inhalation (*i.e.*, the absorption of marijuana by a nonuser who is in an environment in which marijuana is being used by others) could account for the THC level in petitioner's urine (Tr. 169). Dr. Jain further testified that even if urine leaked out of the two samples that had been shipped with petitioner's sample, her sample would have been unaffected. Lastly, Dr. Jain testified that all of the remaining samples in the batch with petitioner's from England Air Force Base tested negative for the presence of THC (Tr. 198-199; GX 5). Petitioner Hill did not present any evidence on her behalf.

2. *No. 86-1954.* Following a general court-martial before a military judge at Barksdale Air Force Base in Louisiana, petitioner Marble, a member of the United States Air Force, was convicted of the wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. (Supp. III) 912a. He was sentenced to five months' confinement, forfeiture of $6,000, and dismissal from the service. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1954 Pet. App. 2a-3a). The Court of Military Appeals affirmed (*id.* at 1a).

On August 30, 1984, petitioner Marble provided a urine sample at the Barksdale Air Force Base hospital for urinalysis testing as part of a random inspection of members of his unit (Tr. 63, 64). On September 4, 1984,

this sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base, Texas (Tr. 91-93). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Labs disclosed the presence of THC in petitioner Marble's urine (Tr. 256; GX 17, at 4).[1]

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Michael A. Peat, an expert in forensic toxicology, who interpreted the test results (Tr. 248-277, 311-319; GXs 5, 11-14, 17). Dr. Peat testified that the levels of THC in petitioner Marble's urine sample were "[e]xtremely consistent" with petitioner's use of marijuana within the 30 days preceding the date he provided the sample, and that it was likely that petitioner had used marijuana within the prior two or three days (Tr. 262, 265). Dr. Peat viewed as "improbable" petitioner Marble's not feeling the effects of marijuana use in light of the THC levels found (Tr. 263-264), and he categorically rejected the possibility that "passive inhalation" could account for the THC level in petitioner's urine (Tr. 269-270).

Testifying on his own behalf, petitioner Marble denied ever smoking marijuana or using "any drugs whatsoever" (Tr. 290-291), but he offered no explanation for the positive urinalysis test results (Tr. 291). Petitioner Marble also testified that about five days before giving the sample he attended an off-base party where he consumed some of the food and drinks provided by the host, but he did not contend that the food or drinks were adulterated with marijuana or another drug (Tr. 289-290, 297-298, 303). Nevertheless, to rebut any implication of innocent ingestion, the prosecution recalled Dr. Peat in rebuttal, and he

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[1] Petitioner does not contest the validity of the chain of custody or the testing procedures used with respect to his urine sample, nor does he contest the accuracy or reliability of the scientific principles involved in the tests employed (radioammunoassay and gas chromatography/mass spectrometry) (see Pet. 3 n.1).

testified that it was "extremely unlikely" that consumption of adulterated food or drink four or five days before the urine sample was taken could account for the THC levels found in petitioner Marble's urine sample (Tr. 313). Dr. Peat did acknowledge that ingestion of hashish or hashish oil—both rarer forms of marijuana—within a shorter period of time prior to giving the sample could possibly result in THC levels similar to those found in petitioner Marble's urine (Tr. 315-316). Dr. Peat also testified that marijuana used "cold" in foods such as salads is much less effective in releasing THC within the body than marijuana which is baked or cooked, and that marijuana found in cold foods would have to be ingested in much greater amounts or in a much shorter period of time to account for the concentration of THC involved in this case (Tr. 318-319).

3. *No. 86-1955.* Following a special court-martial at Homestead Air Force Base in Florida, petitioner Cox, a member of the United States Air Force, was convicted of the wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. (Supp. III) 912a. He was sentenced to two months' imprisonment, a reduction in rank to airman basic, and a bad conduct discharge. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1955 Pet. App. 2a). The Court of Military Appeals affirmed (*id.* at 1a).

On October 22, 1985, petitioner Cox provided a urine sample at the Homestead Air Force Base Hospital for urinalysis testing as part of a random inspection of active duty members assigned to the base (Tr. 32). On that day, that sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base, Texas (Tr. 34-35). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Laboratory disclosed the presence of ben-

zoylecgonine (BE) in petitioner Cox's urine (Tr. 78, 82; GX 7, at 1; GX 8, at 1). BE is the major psychoactive component of cocaine that is commonly detected. Its presence in the urine conclusively establishes the use of cocaine (Tr. 76, 83-85).[2]

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Michael A. Peat, an expert in forensic toxicology, who interpreted the results (Tr. 72-89; GXs 6-8). Dr. Peat testified that the levels of BE metabolite in petitioner Cox's urine samples were consistent with petitioner's use of cocaine within the 30 days preceding the date he provided the sample (Tr. 83-84).

Testifying on his own behalf, petitioner Cox denied ever using cocaine (Tr. 90-91, 93), but he offered no explanation for the positive urinalysis results (Tr. 90-96). Petitioner Cox also testified that the day before giving the sample he had watched TV and drunk a couple of beers with a friend, and that he had gone that night to a club where he had a few drinks. Petitioner Cox did not expressly contend that the beers or drinks were adulterated with cocaine or any other drug, nor did he say he felt the effects of cocaine after drinking that day (Tr. 92-93).

The trial judge instructed the court-martial panel as follows on the elements of the offense (Tr. 124-125):

> To be punishable under Article 112a of the Uniform Code of Military Justice, use of a controlled substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization. Use of a controlled substance is not wrongful if, one, done pursuant to legitimate law enforcement activities, for example an informant who

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[2] Petitioner does not contest the validity of the chain of custody or the testing procedures used with respect to his urine sample, nor does he contest the accuracy or reliability of the scientific principles involved in the tests employed (Tr. 11-12; GX 1).

> is forced to use drugs as a part of an undercover operation in order not to be discovered; or, two, if done by authorized personnel in the performance of medical duties or experiments; or, three, without knowledge of the contraband nature of the substance. Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Petitioner Cox did not object to this instruction, nor did he request any additional instruction (Tr. 108, 110, 129).

ARGUMENT

1. Petitioners Hill, Marble, and Cox contend (86-1953 Pet. 4-8; 86-1954 Pet. 7-25; 86-1955 Pet. 22-24) that the inference of wrongful use of marijuana authorized by *Manual for Courts-Martial, United States—1984*, Pt. IV, para. 37c(5) (*Manual*) is unconstitutional because it is irrational and because it shifts to the defendant the burden of proof on an essential element of the offense of the wrongful use of marijuana.[3] That claim is not materially different from the question presented in *Douglas* v. *United States*, No. 86-1893. For the reasons given in our brief in opposition in that case,[4] review by this Court of petitioners' contention is unwarranted.[5]

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[3] Petitioners Hill and Marble were convicted in a bench trial, so no instructions were involved.

[4] We have provided counsel for each petitioner with a copy of our brief in *Douglas*.

[5] Petitioners' reliance on *State* v. *Flinchpaugh*, 232 Kan. 831, 659 P.2d 208 (1983), is misplaced. That case did not arise in the unique context of the military system, which, for several reasons, reduces the likelihood that any particular use of contraband is innocent. See *United States* v. *Ford*, 23 M.J. 331, 336-337 (C.M.A. 1987).

2. Petitioner Marble also contends (86-1954 Pet. 25-29) that Part IV, para. 37c(5) of the *Manual* is unconstitutional because it requires the defendant to bear the burden of production on the wrongfulness element of the offense. That claim is insubstantial. As the Court of Military Appeals explained in *United States* v. *Harper*, 22 M.J. 157, 162 (C.M.A. 1986), the permissive inference authorized by the *Manual* only requires a defendant to come forward with some evidence that his use of marijuana was innocent. Shifting the burden of going forward to the defendant is not unconstitutional. *E.g., Simopoulos* v. *Virginia*, 462 U.S. 506, 510 (1983); *Engle* v. *Isaac*, 456 U.S. 107, 120-121 & n.20 (1982); *Mullaney* v. *Wilbur*, 421 U.S. 684, 701-703 nn. 28, 30-31 (1975); *Barnes* v. *United States*, 412 U.S. 837, 846 n.11 (1973); *United States* v. *Harper*, 22 M.J. at 162.[6] Petitioner Marble's claim therefore lacks merit.

3. Finally, petitioner Cox contends (86-1955 Pet. 12-22) that random, compulsory urinalysis inspections are an unlawful search or seizure forbidden by the Fourth Amendment. Petitioner has waived that claim, however. The rules of procedure governing courts-martial require a defendant to raise a claim such as this one by filing a motion to suppress before entering a plea. The failure to do so amounts to a waiver of the claim absent "good cause" for the default. Rule for Court-Martial 905(b)(3) and 905(e), *Manual for Courts-Martial, United States—1984*; Mil. R. Evid. 311(a)(1) and 311(d)(2)(A); cf. Fed. R. Crim. P. 12(b)(3) and 12(f); *Davis* v. *United States*, 411 U.S. 233 (1973). Petitioner did not raise this claim at trial, and he has offered no excuse, much less good cause, for his failure to do so. Moreover, petitioner did not raise the claim before the Air Force Court of Military Review or

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[6] Petitioner Cox's reliance on *Mullaney* v. *Wilbur*, *supra*, is misplaced. *Mullaney* held invalid a state rule shifting the burden of proof to the accused, not simply the burden of going forward.

before the Court of Military Appeals. Petitioner's claim has made its debut in this Court, and this Court should therefore decline to consider it. See, *e.g.*, *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 15 n.18.[7]

[7] Petitioner's claim would not warrant review by this Court in any event. The military courts have ruled that warrantless, random, compulsory urinalysis inspections do not violate the Fourth Amendment even when conducted in the absence of a reasonable suspicion that a servicemember has used contraband, *Murray* v. *Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983); *United States* v. *Wade*, 15 M.J. 993, 1003-1004 (N.M.C.M.R. 1983), and the only civilian court to consider the issue has agreed with the military courts, *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 474-477 (D.C. Cir. 1975). These courts have upheld random urinalysis inspections on the grounds that (1) drug use in the armed forces poses a substantial threat to military readiness and efficiency; (2) servicemembers have a lower expectation of privacy than civilians; (3) the primary purpose of such inspections is to protect the health of the servicemembers and the ability of a unit to carry out its mission, rather than to discover evidence for a criminal prosecution; (4) unannounced drug inspections are the most effective means of identifying drug users; and (5) the military has attempted to guard the dignity and privacy of soldiers insofar as practicable. *Murray*, 16 M.J. at 81; *Callaway*, 518 F.2d at 476-477; Mil. R. Evid. 313(b). None of the cases cited by petitioner involve the unique environment of the military. They are therefore not persuasive precedents with respect to the issue of compulsory drug-testing in the armed services.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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